In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 917

MORTON JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 6199

IRVING SPIELER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioners Jacobs and Spieler were convicted of offering a bribe to an Internal Revenue Service agent in violation of 18 U.S.C. 201 and of conspiracy in connection therewith in violation of 18 U.S.C. 371–372. Each was sentenced to concurrent one-year prison

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terms; Spieler's sentence was suspended and he was placed on probation for one year. The court of appeals affirmed, 431 F. 2d 754 (J. Pet. App. A; S. Pet. App. A).[1]

In 1966 the Internal Revenue Service investigated an alleged attempt by one Martin Siegel and one Harold Adler to bribe a revenue agent involved in a federal income tax audit of tax returns of television comedian Alan King. Siegel and Adler were subsequently indicted. Petitioner Spieler, an attorney, represented Siegel in the grand jury proceeding leading to the indictment; petitioner Adler was a friend of Spieler. Brian Bruh, an Internal Revenue Special Agent and the government's principal witness in petitioners' trial, was friendly with Jacobs and occasionally commuted to and from work with him. (S. Pet. App. 3a.)

In April 1967, before Siegel was indicted, Jacobs requested that Bruh meet him at his office. Jacobs mistakenly believed that Bruh was directly involved in the investigation of Siegel being conducted by the Internal Revenue Service. Bruh met with Jacobs on April 5, at which time Jacobs discussed the Siegel investigation and indicated that an attorney acquaintenance had mentioned "there would be a lot of money in it" for any revenue agent who could "present a case on Siegel favorably, thereby it would go easier on Siegel." (S. Pet. App. 4a.)

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[1] The petition in No. 917 is referred to as "J. Pet."; the petition in No. 6199 is referred to as "S. Pet.". We note that the petition in No. 917 is out of time under Rule 22(2).

Bruh reported Jacob's remarks to his superiors and with their approval returned to Jacob's office on the afternoon of April 5. Additional meetings between Jacobs and Bruh occurred on April 11th, 18th, 20th and 26th. Jacobs identified petitioner Spieler as the attorney involved, and on May 5 Bruh met with Jacobs and Spieler at Jacobs' office. At the April 11th and all subsequent meetings, Bruh carried concealed transmitting and recording equipment. Transcripts of the recordings thus obtained, except for the April 11th meeting, were received into evidence over objection. They and the testimony of Bruh formed the basis of the government's case against petitioners. (S. Pet. App. 4a–9a.)

The government's proof indicated that the objective which Jacobs and Spieler sought to attain by contacting Bruh was to assist Siegel with his legal difficulties by enlisting Bruh and using bribe monies to be raised by Jacobs and Spieler. Petitioners denied that any bribe attempt occurred or that any conspiracy existed.

In the court of appeals petitioners sought reversal of their convictions on essentially the same grounds advanced here, that: (1) the evidence against them is insufficient; (2) portions of the judge's charge to the jury constitute reversible error; and (3) the use of the recorded conversations as evidence against them, where the electronic overhearing was not authorized by a warrant, violates their rights under the Fourth Amendment. Spieler additionally contended (as he does here) that he was the victim of a government plan of en-

trapment, and that his motion for new trial predicated on alleged newly discovered evidence was improperly denied. In its careful opinion, the Second Circuit considered and rejected each ground asserted by petitioners, and accordingly affirmed their convictions. We here rely on the comprehensive opinion of the court below, adding only two matters.

1. Petitioners attack the trial judge's instructions to the jury (S. Pet. App. 13a) concerning proof of their participation in a conspiracy as improper and inconsistent with the principles followed in other circuits.

In the Second and Ninth Circuits, the trial judge may instruct the jury that the participation of any defendant in a conspiracy can be established by evidence of the acts and statements of other alleged conspirators. See, *e.g.*, *United States* v. *Baker*, 419 F. 2d 83 (C.A. 2), certiorari denied, 397 U.S. 976; *United States* v. *Nuccio*, 373 F. 2d 168 (C.A. 2), certiorari denied, 387 U.S. 906; *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. First, however, the judge "must make a preliminary determination whether, if the testimony of the government witnesses is accepted as true, each defendant's own acts and statements show a connection with the conspiracy sufficient to justify the admission of the acts and statements of co-conspirators against him." *United States* v. *Baker*, *supra*, 419 F. 2d at 88. If the judge so finds, the jury is instructed to consider all the evidence admitted, including evidence of the acts and statements of co-conspirators, to determine whether the

defendant purposefully became a part of the conspiracy. The older practice, for which petitioners apparently contend, was to charge that, while all the evidence could be considered in determining whether a conspiracy existed, the jury must determine from independent proof of the defendant's own acts that he was a member of the conspiracy, and then could consider acts and declarations of co-conspirators in determining guilt beyond a reasonable doubt.

The present rule in the Second and Ninth Circuit results in a presentation of the issues to the jury in a simpler and more comprehensible fashion than was required under the older procedure while, at the same time, it safeguards the rights of the defendant in that the judge must determine, as a matter of law, whether the evidence of his membership in the conspiracy is sufficient to warrant submission of that issue to the jury. As noted in *Carbo* v. *United States, supra,* 314 F. 2d at 737, this approach is consistent with the usual allocation of functions between judge and jury which assigns to the judge the task of deciding preliminary questions of fact determinative of the admissibility of evidence. In this context the instructions in this case properly apprised the jury of its fact-finding function and protected rather than impaired petitioners' Sixth Amendment jury trial rights.

2. The issue whether a warrant is necessary to support the introduction of an electronic recording made with the consent of one party to the conversation—previously decided in *Lopez* v. *United States,* 373 U.S. 427—is before this Court in *United States* v. *White,*

No. 13, this Term. While this case differs from *White* in that the government agent here testified at petitioners' trial, the Court may wish to defer consideration of this petition pending its decision in *White*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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